Petition

81-6082

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-_____

JUDSON RUFFIN,

Petitioner

vs.

SAMUEL W. AUSTIN, Warden,

Georgia State Prison,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

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TABLE OF CONTENTS

Table of Authorities . . . . . ii, iii

Citations to Opinion Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Question Presented 2

How the Issue was Raised Below 3

Statement of the Case. 3

Reasons for Granting the Writ. 6

Petitioner was denied the effective assistance of counsel, pre-trial, in the guilt/innocence phase of trial, and at the sentencing phase of trial in a capital case where the sentence of death was imposed in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution 6

Conclusion 24,25

TABLE OF AUTHORITIES

Cases

Brooks v. State, 183 Ga. 466, 188 S.E. 711 (1936) . . . 16

Broznack v. State, 109 Ga. 514, 35 S.E. 123 (1900). . . 18

Clark v. State, 146 Ga. App. 697, 247 S.E. 2d 211 (1978)17

Cuyler v. Sullivan, 446 U.S. 335 (1980) 7,9

Dixon v. Harper, 407 F. Supp. 58 (N D Ga. 1976) 13

Fleming v. State, 246 Ga. 90, 270 S.E. 2d 185 (1980). . 8

Foxworth v. Wainwright, 516 F. 2d 1072 (5th Cir. 1975). 7

Godfrey v. Georgia, 446 U.S. 420 (1980) 4

Green v. Georgia, 422 U.S. 95 (1979) 7

Houston v. Estelle, 569 F. 2d 372 (5th Cir. 1978) . . . 24

Johnson v. State, 122 Ga. App. 526, 177 S.E. 2d 844 (1971) . 18

Jones v. State, 243 Ga. 820, 251 S.E. 2d 561 (1979). . .

Lockett v. Ohio, 438 U.S. 586 (1978) 7

Lofton v. State, 142 Ga. App. 579 236 S.E. 2d 508 (1977)15

MacKenna v. Ellis, 280 F. 2d 592 (5th Cir. 1960). . . . 13.

Moore v. State, 10 Ga. App. 805, 74 S.E. 315 (1912. . . 18

Pitts v. Glass, 231 Ga. 638, 203 S.E. 2d 515 (1974) . . 13

Powell v. Alabama, 287 U.S. 45 (1932) 6

Ruffin v. State, 243 Ga. 95, 252 S.E. 2d 472 (1979. . . 3

Smalls v. State, 105 Ga. App. 669, 31 S.E. 571 (1889) . 17

Taylor v. Kentucky, 436 U.S. 478 (1978. 24

Taylor v. State, 121 Ga. 348, 49 S.E. 303 (1904 17

Von Moltke v. Gillies, 332 U.S. 708 (1948). 6

Wells v. State, 194 Ga. 70, 20 S.E. 2d 580 (1942) . . . 18

Williams v. State, 117 Ga. App. 79, 159 S.E. 2d 711 (1968). 16

Constitutional Amendments

Sixth Amendment 2,25

Eighth Amendment 2,25

Fourteenth Amendment. 2,25

Statutes

28 U.S.C. sec. 1257(3). 1

Ga. Code Ann. sec. 24-3319. 2,17

Ga. Code Ann. sec. 24-4526. 2

Ga. Code Ann. sec. 26-1101. 2,3

Ga. Code Ann. sec. 26-1302. 2,3

Ga. Code Ann. sec. 26-1311. 2,3,14,19

Ga. Code Ann. sec. 26-9908(a) 2,3

Ga. Code Ann. sec. 27-2534.1 (b)(2) 2
(See also Appendix C, p. 5)

Ga. Code Ann. sec. 27-2534.1 (b)(7) 2
(See also Appendix C, p. 5)

Ga. Code Ann. sec. 50-127 2,3

Ga. Code Ann. sec. 81-1009. 16

Other Authorities

ABA Standards Relating to the Prosecution Function and the Defense Function, sec. 4.1 6,17

Uniform Rules of Criminal Procedure, Rule 541 15

Annotation 40 L. Ed. 2d 886 (1975). 18

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PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

Petitioner, Judson Ruffin, prays that a Writ of Certiorari be issued to review the Judgment of the Supreme Court of Georgia entered on October 21, 1981.

CITATIONS TO OPINION BELOW

The opinion of the Superior Court of Tattnall County, Georgia, denying Judson Ruffin's Petition for a "Writ of Habeas Corpus" was entered on the 20th day of April, 1981 and was unreported.

The Order of the Supreme Court of Georgia and the unreported opinion of the Superior Court of Tattnall County are set out in Appendices A and B respectively.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3), Petitioner having asserted below and asserts in this Court deprivation of rights secured by the Constitution of the United States.

Discretionary review of the Judgment of the Superior Court of Tattnall County was sought in the Supreme Court of Georgia pursuant to Ga. Code Ann. Sec. 24-4526 and Ga. Code Ann. Sec. 50-127.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Code of Georgia, the texts of which are set out in Appendix C, attached hereto:

Georgia Code Ann. Sec. 24-4526
Georgia Code Ann. Sec. 26-1101
Georgia Code Ann. Sec. 26-1902
Georgia Code Ann. Sec. 26-1311
Georgia Code Ann. Sec. 26-1302
Georgia Code Ann. Sec. 26-9908(a)
Georgia Code Ann. Sec. 50-127
Georgia Code Ann. Sec. 27-2534.1 (b)(7)
Georgia Code Ann. Sec. 27-2534.1 (b)(2)
Georgia Code Ann. Sec. 81-1009
Georgia Code Ann. Sec. 24-3319

QUESTION PRESENTED

-1-

Whether Petitioner was denied the effective assistance of counsel pre-trial, in the guilt/innocence phase of trial, and at the sentencing phase of trial in a capital case where the sentence of death was imposed in violation of the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

HOW THE ISSUE WAS RAISED BELOW

Petitioner's state Petition for Writ of Habeas Corpus filed in the Superior Court of Tattnall County, Georgia, pursuant to Ga. Code Ann. Sec. 50-127 raised the Constitutional issue of ineffective assistance of trial counsel. The Habeas Corpus Court considered the merits of the issue and found against Petitioner. The Constitutional issue was raised again on "Application for Certificate of Probable Cause to Appeal" in the Supreme Court of Georgia which denied the Application.

STATEMENT OF CASE

Petitioner in this case, JUDSON RUFFIN, was convicted in the Taliaferro County Superior Court of November 30, 1977, for the offenses of murder, (Ga. Code Ann. Sec. 26-1191), armed robbery, (Georgia Code Ann. Sec. 26-1902), kidnapping (2 cts.), (Ga. Code Ann. Sec. 26-1311), aggravated assault, (Ga. Code Ann. Sec. 26-1302), and possession of a firearm during the commission of a crime, (Ga. Code Ann. Sec. 26-9908(a)(R.25;T.394-395).[1] Also indicted for the aforesaid offenses were Nathaniel Brown and Jose High, but were tried separately. Petitioner received a death penalty on the murder count, life sentences for the armed robbery and the kidnapping, five years consecutive for possession of a firearm and ten years consecutive for aggravated assault (R. 28-34; T. 443-445). Petitioner's convictions and sentences were affirmed on direct appeal. Ruffin v. State, 243 Ga. 95, 252 S.E. 2d 472 (1979); cert. denied 444 U.S. 995 (1979), Rehearing denied 444 U.S. 1103 (1980). On Remittitur,

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[1] References of the official record and transcript of Petitioner's trial, which had been stipulated into the evidence in the Habeas case, are referred to in this Brief as (R.) and (T.); references to the transcript of Petitioner's Habeas Corpus Hearing are designated as (HT.) which is not included in the Appendix.

the case was returned to the Taliaferro Court and upon resentencing by Judge Robert L. Stevens on May 26, 1980, Petitioner was sentenced to death by electrocution on June 13, 1980. Petitioner filed for a Writ of Habeas Corpus on June 6, 1980, and obtained a Stay of Execution on the same as per Order of the Honorable James E. Finley, Judge, Superior Courts, Atlantic Judicial Circuit. At the time of the incident in 1976, Petitioner is alleged to have committed, he was a 26 year old black man, illiterate or semi-illiterate.

A hearing of Petitioner's Petition for Writ of Habeas Corpus (hereinafter referred to as the "Petition") was held before the Honorable John R. Harvey, Judge, Superior Courts, Atlantic Judicial Circuit on October 31, 1980. At the hearing, despite Petitioner's numerous assertions contending that his convictions and sentences should be reversed because of Constitutional violations, by stipulation between counsel for the Petitioner and The State and with the agreement of the Court, the hearing addressed primarily the claims of effectiveness of trial counsel and the legality of Petitioner's death sentence after this Honorable Court's decision in Godfrey v. Georgia 446 U.S. 420 (1980).

Generally, the evidence produced at Petitioner's trial is contained in the Georgia Supreme Court's opinion supra, page 95. The State presented the story of the crime mainly through the eyewitness testimony of the service station attendant, Mr. Phillips. Essentially, the evidence showed that Petitioner and two co-defendants planned the late night July 26, 1976 robbery of the Amoco Service Station in Crawfordville, Georgia, that Mr. Phillips was operating at the time, and had with him his stepson, Bonnie Bulloch. After robbing Mr. Phillips

at gunpoint, Petitioner and the two co-defendants made Mr. Phillips at gunpoint get into the trunk of Petitioner's car, and had Bonnie Bulloch get into the backseat of the car. The victims were driven to a desolate wooded area where they were released from the trunk and the backseat of the car and told to lie face down on the ground in front of the car. At this point in the trial Mr. Phillips testified as follows:

> Q. What did they do to you?
>
> A. O.K. They told me to come around in front of the car and told the boy, too--to lay face down on the ground and then one of them said, "Go get the rope and let's tie them up." And then I heard a couple of shots and that's all I know until I woke up." (T. 85).

After Mr. Phillips woke up from his unconsciousness and discovered that Bonnie Bulloch was dead, he got up and walked to the road to a lady's house where he summoned the authorities. Prosecution presented no evidence other than Petitioner's challenged and disclaimed confession that Petitioner killed Bonnie Bulloch, attempted to kill him, or intended to kill him. In fact, the evidence presented by the prosecution indicated that Petitioner did not kill Bonnie Bulloch (T. 100-102). On pages 100, 101, and 102 of the trial transcript, evidence was presented by the State that Mr. Phillips never saw Defendant Ruffin with anything but a sawed off shotgun in his hand; and that some other black male had a pistol in his hand. The death of Bonnie Bulloch was caused instantly by the brain being shot with a projectile from a .32 caliber pistol. Another .32 caliber bullet struck the victim in the head but was not the fatal shot (T. 173-183).

REASONS FOR GRANTING THE WRIT

PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, PRE-TRIAL, IN THE GUILT/INNOCENCE PHASE OF TRIAL, AND AT THE SENTENCING PHASE OF TRIAL IN A CAPITAL CASE WHERE THE SENTENCE OF DEATH WAS IMPOSED IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Pre-trial

The pre-trial phase of a criminal defense is "perhaps the most critical period of the proceeding," a time when "consultation, thoroughgoing investigation and preparation are vitally important." Powell v. Alabama, 287 U.S. 45, 57 (1932); accord, e.g., Von Moltke v. Gillies, 332 U.S. 708 (1948).

Section 4.1 of the American Bar Association Standards Relating to the Prosecution Function and the Defense Function states:

> "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities..."

In this "most critical" phase, Petitioner's trial counsel's failings were numerous.

Petitioner's trial counsel, Mr. Walton J. Hardin, was present at the Evidentiary Hearing in this case as a witness and testified that he had been appointed to represent the Petitioner on March 17, 1977, and additionally, he was appointed to represent Petitioner's two co-defendants (T. 71-72, 78).

Although in the Habeas Hearing, Attorney Hardin stated he made a mandatory motion to sever, (HT..72), he did not make a motion to disqualify himself from representing the co-defendants, because of the obvious conflicts of interest that would be inherent in a death penalty case where the State was seeking the death penalty against all three co-defendants. In a death penalty case even a slight conflict, irrelevant to guilt or innocence, may be important in the sentencing phase. Green v. Georgia, 422 U.S. 95 (1979); Lockett v. Ohio, 438 U.S. 586 (1978).

The fault in this case lies not only with the trial counsel who failed to call to the court's or his client's attention the conflict of interest. The blame must fall, possibly more heavily on the trial court which appointed one lawyer to represent the co-defendants and failed to ever inform Judson Ruffin of the possible conflict even after the full reality of the conflict unfolded at trial.

"The trial judge has an obligation, however, to anticipate conflicts reasonably forseeable at the outset of the case, when counsel is appointed." Foxworth v. Wainwright, 516 F. 2d 1072, 1076 (5th Cir..1975)(Emphasis added).

> ...courts must avoid compromising counsel's ability to represent a client zealously within the bounds of the law by appointing one lawyer to defend two or more parties with inconsistent interests.[2] Id. at 1076.

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[2] The above quoted language from Foxworth v. Wainwright, supra, was noted with approval by the United States Supreme Court in Cuyler v. Sullivan, 446 U.S. 335, 348 n. 13 (1980.

The Supreme Court of Georgia, recognizing the inherent evil of dual representation, especially in death penalty cases, has held that co-defendants in capital cases may not be represented by the same attorney or law firm. Fleming v. State, 246 Ga. 90, 270 S.E. 2d 185, 199 (1980). Any attorney who violates this rule is subject to sanctions. Id. at 188. "Such a rule is especially necessary where the death penalty is sought, because in these cases even a slight conflict, irrelevant to guilt or innocence, may be important in the sentencing phase." Id.

Had Judson Ruffin's case been tried after the Fleming decision, he would have been appointed conflict-free counsel.

Although Fleming was not decided at the time of Mr. Hardin's appointment to represent the co-defendants in a death penalty case, he still should have sought to have himself disqualified from having to represent all three co-defendants because of the built in conflicts of interest. Indeed, on Page 90 through 92 of the Habeas Hearing Transcript, Attorney Hardin admitted that Petitioner never admitted to him that he was "high on dope," either on the night the robbery and murder took place, or later when he signed the confession to which he denied knowing what he was signing, and that any information of Petitioner being "high on dope" was provided to him by a co-defendant.

Other conflicts of interest between the co-defendants were brought to light in the Habeas Hearing, and Attorney Hardin testified that at first he thought it would be impossible to put Petitioner on the stand except during the penalty phase because of nine other capital felonies pending in Richmond County that ranged from murder to rape to sodomy on the part

of co-defendant High, and that "all of these boys" came out of Richmond County to Taliaferro County (T. 98). Attorney Hardin in the Habeas Hearing admitted that he had been trying to work out a plea for Nathan Brown since the time of his appointment (HT. 105), and that the conditions of Brown's plea would be that he would have to turn state's evidence against Petitioner and co-defendant High, which he (Brown) did not want to do (HT. 105). See also page 106 of the Habeas Hearing transcript where Mr. Hardin stated... "...there was no way in the world I could do to mitigate anything except Nathan Brown's case."

This Honorable Court in Cuyler v. Sullivan, 446 U.S. 335 (1980) held that:

> "In order to establish violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. (Emphasis added). But, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief."

It is apparent from the Habeas record there can be no doubt that the various conflicts of interest surrounding Judson Ruffin's trial actually affected the adequacy of his trial attorney's representation.

Although Attorney Hardin at the Habeas Hearing testified that he had interviewed Petitioner on numerous occasions and investigated the facts of the case and interviewed the State's witnesses and spoke to the District Attorney, GBI investigators relating to the evidence the State would offer (HT. 74-76), Attorney Hardin also testified that he was only notified that he was to be ready to actually try the case on Thursday prior to the trial to commence the following Monday (HT. 72). Attorney Hardin testified at the Habeas Hearing that he did not feel

that he had been given adequate opportunity for preparation for a trial to begin Monday morning and expressed that to the District Attorney's office and the trial Judge that he had not been given enough time (HT. 72,76). Despite Attorney Hardin's feelings that he had not been given enough notice to prepare for the case, he made no effort to make a formal Motion for a Continuance or even an informal Request for Continuance, because he felt that such a request would be unsuccessful because the trial Judge was a "hardliner" and likes to keep a clean docket." (HT. 80). Attorney Hardin also testified in the Habeas Hearing that there is no Criminal Docket kept in the Toombs Judicial Circuit, and that after civil litigation has been completed, an attorney that has been appointed to an indigent's case will be called on the phone and be told to "saddle up, We're ready to go." (HT. 76). Attorney Hardin testified on direct examination by the State that as soon as he was notified of the impending Monday trial, he went straight to Thomson, Georgia, to talk to the Judge and the D.A. to see what he could do, because he was trying to work out a plea with the State for Nathan Brown's life (HT. 105). But earlier in the hearing, on cross-examination by Petitioner's counsel, he stated as soon as he learned of his impending Monday trial, that:

> "So, as soon as I received the call, I immediately went back to the jail in Augusta to see Judson." (HT. 73) (Emphasis added).

At the Habeas Hearing when questioned about why he did not challenge the Grand Jury Array, Attorney Hardin stated he could see no merit in it, and that he did not like to file "frivolous"

motions, although he admitted that the Grand Jury Array was successfully challenged by Petitioner's co-defendant Jose High, at his subsequent trial where Attorney Hardin admitted he worked with another attorney on the successful challenge of the same indictment which included Petitioner's other co-defendant, Nathan Brown (HT. 79-83). Attorney Hardin testified that a challenge to the Grand Jury would be frivolous and admitted it was more of a practical problem even though he felt it was meritorious (HT. 83). Mr. Hardin also testified that on direct examination by the Assistant Attorney General that he did nothing to indicate to Petitioner his right to challenge the Grand Jury if he chose to do so. (HT. 105). Likewise, Attorney Hardin testified that he could gain nothing by challenging the Traverse Jury either (HT. 86).

In the Habeas Hearing, Attorney Hardin stated that he did not have a tough trial or a tough District Attorney (Kenneth Goolsby) but to quote him on page 95 of the Habeas Transcript he states:

> "I had the fact that the Judge was, at that time was planning to go along with Mr. Goolsby on anything on a criminal case." (Emphasis added).

Despite knowledge on the part of Petitioner's trial counsel that the Trial Judge was going to be inclined to be not impartial but side with the prosecutor, Attorney Hardin made no request that the Judge recuse himself nor did he make any efforts to have the Judge disqualified for being biased in favor of the state. Attorney Hardin also testified that Judge Stevens does not appoint his enemies to a case like Petitioner's. He also stated that Judge Stevens is a fine man (HT. 80).

Attorney Hardin testified at the Habeas Hearing that he recieved a total of $500.00 for representing not only Petitioner's

trial and appeal but for his efforts in the co-defendant's trials and appeals (HT. 69). Nothing in the record of Petitioner's trial, appeals, or during the Habeas Hearing indicated that defense counsel Hardin asserted his right to be able to provide adequate defense for Petitioner by filing an appropriate motion requesting funds for such action. In almost every issue concerning provisions for indigent defendants, potential Equal Protection issues lie. The issues should be reserved and because of Petitioner's counsel's pretrial omissions to preserve these issues in the case sub judice they have been neglected. A recent enactment by the Georgia Legislature provides for reimbursement by the state to local jurisdictions who have expended large sums to prosecute death penalty cases should make even stronger the argument that Equal Protection in the right to meaningful access to the Court is violated when indigents are denied necessary assistance.

Although Attorney Hardin testified to making extensive pre-trial preparations between his March 17, 1977 appointment and the trial in November, it seems clear from the Habeas Transcript that only after he realized he had to "saddle up and get ready" for Petitioner's trial on the Thursday before Monday it was to begin that he began to even ascertain and gather any and all mitigating evidence to use in Petitioner's impending penalty-phase portion of his trial. See generally (HT. 72-75, 104-109). This assertion is especially persuasive in light of the fact that he testified that he originally testified that he thought co-defendant High's case was to be tried on Monday, and not Petitioner's (HT. 72), and that he immediately went to the District Attorney's office "to see what he could do." (HT. 104), in light of the fact he was trying to work out a plea

for co-defendant Brown to testify against Petitioner (HT. 105); see especially Mr. Hardin's statement he made in the Habeas Hearing on page 74, to wit:

> "I went to the jail. I went to the jail on Thursday, went to the jail on Friday, and went to the jail on Sunday night, and interviewed Judson and also High. An then I found out High had other counsel.[3] And I also interviewed Nathan...Nathan Brown. I was looking for any help I could get. (Emphasis added). I went to the housing project where his mother lived in Augusta, and saw his car and took pictures of his car."

It is apparent from the above that Attorney Hardin did not even start any investigation for mitigating circumstances for Petitioner until the weekend before the trial was to commence.

B. TRIAL

(Both guilt/innocence phase and sentencing phase)

Petitioner was entitled was entitled to reasonably effective counsel who rendered reasonably effective assistance at his murder trial. Pitts v. Glass, 231 Ga. 638, 203 S.E. 2d 515 (1974). See generally, Mackenna v. Ellis, 280 F. 2d 592 (5th Cir. 1960). Dixon v. Harper, 407 F. Supp. 58 (N.D. Ga. 1976). Jones v. State, 243 Ga. 820 251 S.E. 2d 561 (1979). Petitioner's trial and appellate counsel's representation failed to meet even these minimally accepted levels of effective assistance of counsel.

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[3] This statement is most peculiar in that Attorney Hardin had indicated earlier in the Hearing that althought he was appointed to represent all three co-defendants in March, of 1977, the trial was put off until November by request of counsel for Petitioner's co-defendant Jose High, and he had been under the impression when he received the call for trial, High's case was coming up on Monday, and not Petitioner (HT. 71-73).

During the trial, counsel for Petitioner failed to object to prejudicial questions by the prosecution on cross-examination during both the guilt/innocence phase and the sentencing phase of the trial. Additionally, trial counsel failed to object to prejudicial, improper, and imflammatory remarks made by the prosecutor during both the guilt/innocence phase of his argument to the jury and during the sentencing phase of Petitioner's trial for his life.

On cross-examination of Petitioner by the State during the sentencing phase, the prosecutor was allowed without objection by Attorney Hardin to subject Petitioner to improper, inflammatory and highly prejudicial questioning and trickery by deliberately trying to confuse Petitioner into admitting he was guilty, simply because the jury made that decision in the guilt/innocence phase of the trial. On page 406 of the trial transcript the following questions by Prosecutor Goolsby and answers by Petitioner occurred:

> Q. You're going to change your ways?
>
> A. I changed my ways, yes, there will be some more changes in my ways.
>
> Q. But have you changed your ways?
>
> A. Well, I feel different since I been found guilty--yes, I feel different. (Emphasis added).
>
> Q. You feel guilty? (Emphasis added).

This similar type questioning and badgering continued from page 406 of the trial transcript through page 410. On page 409 of the trial transcript Attorney Hardin finally "objected" to the following question by Prosecutor Goolsby:

> Q. If you'd done it, would you tell this jury, you did it? Would you do that or not?
>
> A. I don't know, but I did not do it.

> Mr. Goolsby: Your Honor, that's not the question whether he did it or not, the jury has already said he did it.

Mr. Hardin's objection at this point (which did not ask for a mistrial or for the Trial Judge to admonish the prosecutor in the presence of the jury) was specifically:

> Mr. Hardin: Just because they said he did it, Your Honor, doesn't mean he did it, now, I object to my brother on that basis.

Mr. Goolsby's retort was:

> "He don't have any right to come in here and now say, 'I didn't do it.' The jury has already said he did it."

The Trial Judge agreed with the prosecutor (T. 409). Attorney Hardin sat silent to the Judge's decision and made no motion for a mistrial or that the prosecutor be admonished in the presence of the jury, and the jury be given any curative instruction (T. 409).

This inflammatory and prejudicial conduct on the part of the prosecutor continued until finally Attorney Hardin became a little more agitated by the prosecutor's conduct by telling the Court he felt this was improper questioning by the State. There was no objection by Mr. Hardin at this time nor was there a request for a mistrial (out of the jury's presence or in the jury's presence) or to have the prosecutor admonished and give the jury instructions to diasbuse their minds of such prejudicial tactics and badgering of Defendant (T. 410). Attorney Hardin only suggested to the Trial Judge that the conduct was improper. To suggest to a Trial Judge that such conduct was improper without further request, as outlined above, is not the proper mode to adequately protect the record for Petitioner on appeal. A motion for mistrial should be made promptly after the particular improper conduct. Lofton v. State, 142 Ga. App. 579, 236 S.E. 2d 508 (1977); See also, the Uniform Rules of

Criminal Procedure, Rule 541 which provides:

> (Mistrial)
> A. For Prejudice to Defendant -
> Upon motion of a defendant, the Court may declare a mistrial at anytime during the trial. The Court shall declare a mistrial upon the defendant's motion if there occurs during the trial on error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case. If there are two or more defendants, the mistrial shall not be declared as to the defendant who does not make or join in the motion.

Ga. Code Ann., Sec. 81-1009 seems to imply that a trial judge is to act on his own initiative to prevent prejudicial conduct or matters from being injected into the case. The Georgia courts, however, generally have not interpreted the statute in that manner, but have put the burden on the innocent party by giving him the duty to object or move for a mistrial. Not only have the courts construed defense counsel's burden to make prompt objection and motion for mistrial, but it also held that each time a defendant considers something prejudicial he must object to that evidence and move for a mistrial every time the evidence is brought up. Williams v. State, 117 Ga. App. 79, 159 S.E. 2d 711 (1968). The defendant when faced with a situation as in this discussion may also ask the judge to openly rebuke the prosecutor in the presence of the jury. Brooks v. State, 183 Ga. 466, 188 S.E. 711 (1936).

Without objecting Attorney Hardin also allowed the prosecutor to prejudicially misquote the evidence several times to the trial jury to the effect that "little Bonnie (the victim) begged for his life." (T. 414, 427). The prosecuting attorney also misquoted the evidence without objection by Attorney Hardin when he stated in closing argument in the guilt/innocence phase of the trial that the victim "was forced into the trunk of the car " (T. 356). In the closing argument to the jury in the

guilt/innocence phase, the prosecuting attorney, again without objection, of Attorney Hardin, misquoted the evidence by telling the jury that "...he (the Petitioner) told you he did it." (T.421), and inflicted his own personal feelings as to the guilt or innocence of the accused Petitioner and whether he should live or die by arguing to the jury without objection, when he stated "I don't think he deserves to live." (T. 416) (Emphasis added).

Other examples of prejudicial comments without objection by the prosecution occurred when the prosecutor told the jury that "... he (the Petitioner) lies like a dog." (T. 340). After repeated references to Petitioner by the prosecutor as a liar, Attorney Hardin finally objected on page 354 of the trial transcript, but his objection was to no avail because the trial court essentially [illegible] the District Attorney was allowed to draw inferences from the evidence (T.354).

Without objection the prosecutor was allowed to interject the improper "Golden Rule Argument" (see generally Earle v. Edwards, 117 Ga. App. 559, 161 S.E. 2d 438 (1968), when in the sentencing phase of the trial he asked the jury "to put yourselves or your children in his (the victim) place."(T. 421). It is thoroughly entrenched in Georgia law that the permissible bounds and scope of argument in a criminal trial may be wide, however, it is clear the argument must be based on the evidence and on reasonable and legitimate inferences drawn from it. Smalls v. State, 105 Ga. 669, 31 S.E. 571 (1889); Taylor v. State, 121 Ga. 348, 49 S.E. 303 (1904); Clark v. State 146 Ga. App. 697, 247 S. E. 2d 221 (1978); Ga. Code Ann. sec. 24-3319; see also, ABA Standards-The Prosecution Function (sec. 57.8-57.9 (1971).

It has also long been the law in this state that it is improper for the prosecutor to make statements as to his own personal beliefs that defendant is guilty as to the truth of the facts in dispute, or that the defendant is guilty of a criminal offense. See, Moore v. State, 10 Ga. App. 805, 74 S.E. 315 (1912); Broznack v. State, 109 Ga. 514, 35 S.E. 123 (1900); Wells v. State, 194 Ga. 70, 20 S.E. 2d 580 (1942); U.S. v. Brown, 451 F. 2d 1231 (5th Cir. 1971); Johnson v. State, 122 Ga. App. 526,177 S.E. 2d 844 (1971).

In the discussion supra, concerning the proper manner for opposing counsel to preserve his point for appeal for the injection of improper evidence in a trial, he should move for a mistrial when the trial judge does not interpose itself and prevent such argument by rebuking the offending attorney and instructing the jury to disregard such statements. Attorney Hardin, in these instances, did not avail himself of the methods to achieve the correction of such prejudicial and highly improper argument by the prosecutor. Therefore, Petitioner's right to a fair trial under the United States Constitution was violated because of the State's prosecuting attorney's argument to the jury. See generally, Annotation, 40 L. Ed. 2d 886 (1975).

Petitioner's trial attorney also failed to object to the prosecution's rambling, incoherent, confused, and totally incorrect statements of law made to the jury during both his guilt/innocence phase argument (T. 334-369), and his sentencing phase argument of the trial (T. 414-428).

In the closing argument in the guilt/innocence phase of Petitioner's trial, Prosecutor Goolsby stated:

> "I want to read you the law that His Honor will give you in charge that you said, and we accepted, that you told us that you would try this case." (T. 335)

Goolsby then proceeded to give the definition of kidnapping which amounted to a verbatim translation of Georgia Code Annotated sec. 26-1311(a), simple kidnapping and not kidnapping with bodily harm (T.356). Directly after Prosecutor Goolsby's verbatim definition of simple kidnapping under Georgia law, he went further to state:

> "Now has the State proved that beyond a reasonable doubt? Is there a doubt in your mind that they put this little boy in there and held him against his will in that car? Don't you know that he had to ride in the trunk there? When they shut that hood down on this man, don't you know----have we proved kidnapping----that they took those two away from the place of business against their will and held them them against their will? Is there any doubt about that? He said they did it, and Mr. Phillips said they did it." (T. 356)

Further, in his argument to the jury in the guilt/innocence phase, Prosecutor Goolsby gave an accurate definition of aggravated assault, and then stated:

> "Is there any doubt in your mind, really honestly looking at yourself, looking at the evidence---- listen to the voice of humanity! Is there really any doubt in your mind that they shot this man out there on the ground?" (T. 360).

Immediately preceding Mr. Goolsby's argument at this state of the trial, trial counsel for Petitioner and the prosecutor and the Judge discussed the doctrines of elections and merger. See generally (T. 332-335). In this discussion Attorney Hardin contended that Count One of the indictment alleging armed robbery should allow Count Two (possession of a firearm during the commission of a crime) to merge. Prosecutor Goolsby conceded it would be a "close question." (T. 353). Attorney Hardin told the Court he had no decisions on the subject with him, and the

Court concluded that it thought the issue had been passed on (by the appellate courts), and to be perfectly frank with both counsel for the State and counsel for the defense, that he couldn't remember whether the appellate courts had ruled on the question. As a result the trial court concluded that he was going to proceed to charge the jury on all charges that were set forth in the Bill of Indictment (T. 333) and promptly proceeded to charge the jury on the six counts in the original and only indictment against Petitioner (T.333). The charge of the Court in the guilt/innocence phase is found at (T. 371-393).

Each count of indictment dated February 28, 1977, (R. 15-19) used the words, "with force and arms," and the Judge charged the jury with each count of the indictment by prefacing each charge or count with the words "with force and arms." He did not charge the jury on kidnapping with bodily injury and gave the definition of simple kidnapping as contemplated by Ga. Code Ann. sec. 26-1311 specifically stating:

> "Now, I charge you as to Counts Nos. 3 and 4, and I thus give you the definition of kidnapping. A person commits kidnapping when he abducts or steals away any person against his will. I charge you that kidnapping in this state is a felony. Therefore, in this case, if you find the defendant guilty and if you do not entertain a reasonable doubt as to his guilt of that offense, it would be your duty to convict the defendant, and your verdict should so speak." (T. 386) (Emphasis added).

Nowhere in that charge is there anything concerning kidnapping with bodily injury.

Although these charges and references to the charges by the prosecutor in this state of the trial are correct statements of the law, later, in prosecutor's final argument in the sentencing phase stated (without objection):

"You told me that you believed that the death penalty was a proper penalty under certain circumstances and conditions. All right. Let's start from there.

"The law says that if you shall find that a person is killed in an inhuman way, or if a person is killed in an armed robbery while in the commission of another felony ----if you find that to be true. Or if a person is kidnapped and is harmed and this man was shot----the boy was killed----the kidnapping, the armed robbery, or the murder were committed while he was engaged in the commission of another capital felony---- and you've already found that. The only thing you haven't done, and I'm not pulling anything on you----the only thing you haven't done is you haven't written the verdict and set out the aggravating circumstances. That is, he was killed while in the commission of another felony, which is kidnapping. He was killed while in the commission of another felony which is aggravated assault. He was killed while in the commission of an armed robbery. The armed was committed while kidnapping and murder were were going on----these other felonies. His Honor will charge you about that and don't be confused about it, if you don't under- stand about it come back and ask." (T. 415-416) (Emphasis added).

The prosecutor continued these incoherent, confused, and totally incorrect statements of the law by further stating:

"You have said, ladies and gentlemen of the jury, this man robbed this filling station with a weapon. You have said that this man kidnapped that little boy, put him in that car and rode him out and put him out there and shot him to death. Snuffed out his life that only God could give him. You have said that he kidnapped this man here----took him out there in the trunk of a car in the middle of the night and put him down in the grass with the snakes and lizards and the other things and left him for dead. You have said that, ladies and gentlemen of the jury----not Kenneth Goolsby anymore. You have said that he committed these crimes with offensive weapons----which are double barrel shotguns and pistols. You have said that, ladies and gentlemen of the jury. The law says that if the jury finds those things to be true---- those are aggravating circumstances and that's when the death penalty comes into effect. And I believe in it. I believe this is a terrible crime. I believe in it." (T.417)(Emphasis added).

Prosecutor Goolsby continued to confuse and mislead the jury further in his argument when he stated:

> "What person could you ever put a death sentence on? I want you to ask yourself this. You said that he executed this boy, you said he robbed these people. You said he kidnapped these people. You've done all that. If you can't give the death penalty in this case, what case could you give it in really?"(T..420).

In continuing on the next page of the trial transcript, (T. 421), he argued to the jury:

> "What would you think ought to be done? Should he be given a life sentence? Honest to God, is he entitled to a life sentence here? He himself said that he did it. 'He ought to die----whoever did it." He ought to have to die. Well, you said he did it. All you'd be doing is agreeing with him.
>
> What you ought to do tonight is going to set a precedent for a long time because I don't know if we could ever ask for a death penalty if your son got killed or any of your relatives got killed in a situation like this. I don't know how I could ask the jury to give the death penalty if we're not willing to give it in this. <u>There is no mitigating circumstance</u>. There's no reason whatsoever. It was nothing but pure, unadulterated, premeditated execution----gangland style." (T-421-422) (Emphasis added).

It is understandable that Mr. Goolsby was very concerned with seeing that the most severe penalty of law, (death by electrocution) be imposed upon Petitioner. However, he should not be allowed to tell the jury what the Court is going to tell them the law is in his charge and then make totally incorrect statements of the law as above-mentioned. A few specific examples are:

(1) That the jury may impose the death penalty if the victim is <u>killed in an inhumane way</u>, or

(2) If the victim was <u>killed during the armed robbery while in the commission of another felony</u>;

(3) If the person kidnapped was harmed after the jury had already been told by both the prosecutor and the court that this was only a simple kidnapping case, see (T.346) and (T.372);

(4) That the armed robbery, kidnapping, or murder was committed while the Petitioner was committing another capital felony[4] which they had already found;

(5) That the only thing the jury had not done was to write out the verdict and set up aggravating circumstances, (it should be noted that the prosecutor told the jury this immediately after all of above-numbered comments);

(6) That he was killed in the commission of another felony, kidnapping;

(7) That he was killed in the commission of another felony, aggravated assault;

All of the unobjected to prejudicial comments on the law, both the correct and incorrect statements, obviously confused the jury in light of the trial court's prior instructions and those the jury later received in the sentencing phase of the trial. Certainly the improper comments by the prosecuting attorney on the law, especially where it considers that both charges by the Trial Judge and the other improper tactics mentioned to this point in Petitioner's Brief, could have no effect on the jury

---

[4] This was the only time the jury had heard the expression "capital felony" and this comment expressly implied in a very confusing way that the jury would have to find a capital felony other than either of the three capital offenses mentioned. This argument is buttressed by Prosecutor Goolsby's later comment that the murder occurred during the aggravated assault of Mr. Phillips (T. 416)

but to increase the possibility of the danger of an arbitrary and capricious jury decision. (see, Taylor v. Kentucky, 436 U.S. 478 (1978); and Houston v. Estelle, 569 F. 2d 372 (5th Cir. 1978).

CONCLUSION

By reason of the above, failure of the trial attorney, Walton Hardin, prior to trial, to:

1) Request that he not be forced by the Court to represent three co-defendants when the State is going to be seeking the death penalty;

2) Request a continuance when he was suprised that Petitioner's trial was to begin the Monday after receiving notice by telephone on the prior Thursday;

3) Challenge the Grand Jury Array or the Traverse Jury, or to explain to Petitioner his rights to such procedure;

4) Request the Trial Court Judge to recuse himself or take other alternative measures necessary to see that he be disqualified when Attorney Hardin knew, prior to trial, that the judge was not going to be impartial;

5) Request financial assistance in the preparation of Petitioner's trial in order to insure adequate defense;

6) Start investigation for any mitigating circumstances whatsoever for Petitioner's trial until the weekend before trial, even though he had many months to do such investigation;

and by reason of all the above discussion on the failure of the trial attorney, Walton Hardin, during the trial, to:

1) Adequately object and preserve the record to prejudicial questioning by the prosecutor put to Petitioner in both phases of the trial;

2) Adequately object and preserve the record to improper argument by the prosecutor made to the jury in both phases of Petitioner's trial;

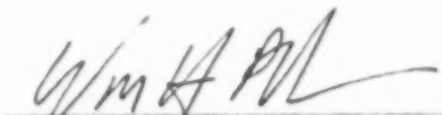
3) Object to the prosecutor making erroneous, misleading, and incorrect statements of law to the jury in his argument in both phases of Petitioner's trial;

there is no room to doubt that Petitioner was deprived of effective assistance of counsel that is absolutely essential for a fair trial required under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Although the Supreme Court of Georgia affirming Petitioner's convictions and sentences addressed portions of the State's prejudicial closing arguments found no error, they only reviewed those raised and properly reserved for appeal by Petitioner's trial counsel. As stated in the discussion in Petitioner's Brief, supra, there were many instances of improper argument in Petitioner's trial not raised and preserved, or argued on appeal by Petitioner's trial and appellate counsel. Therefore, this assertion of error was not totally disposed of by the Georgia Supreme Court as the Habeas Court's order (Appendix B, p. 5) seems to indicate.

WHEREFORE, for the reasons shown, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of Georgia which denied Petitioner's Application to Review his Habeas Order denied by the Tattnall Superior Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served Respondent's Counsel of Record, Mr. Nicholas Dumich, Assistant Attorney General, 132 State Judicial Building, 40 Capitol Square, Atlanta, Georgia 30334; with a copy of the foregoing Petition for Writ of Certiorari and the Appendix thereto, by placing same in the United States Mail with adequare first-class postage attached.

This 19 day of January, 1982.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-_____

JUDSON RUFFIN,

Petitioner

vs.

SAMUEL W. AUSTIN, Warden,

Georgia State Prison,

Respondent

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF GEORGIA

Application No. 1677

SUPREME COURT OF GEORGIA

ATLANTA, October 21, 1981

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

JUDSON RUFFIN V. SAMUEL AUSTIN, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied. All the Justices concur, except Hill, P.J., and Gregory, J., dissents.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

IN THE SUPERIOR COURT OF TATTNALL COUNTY

STATE OF GEORGIA

JUDSON RUFFIN, Petitioner V. SAMUEL AUSTIN, Warden, Georgia State Prison, Respondent	$ $ $ $ $ $ $ $ $ $	CIVIL ACTION NO. 80-93

ORDER

The above captioned case having come before the Court on the Petitioner's petition for habeas corpus relief, with the Petitioner, Judson Ruffin, being represented by attorney William H. Brandon, and the Respondent being represented by Assistant Attorney General Nicholas Dumich. The Court, after considering the testimony and documentary evidence submitted in this case, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Petitioner, at the time of the filing of this action, was incarcerated at the Georgia State Prison at Reidsville, Tattnall County, Georgia. The Respondent, as Warden of the Georgia State Prison, was detaining the Petitioner under the color of authority of the Petitioner's sentence from the Superior Court of Taliaferro County in which the Petitioner was convicted of the offense of murder, armed robbery, kidnapping, aggravated assualt, and possession of a firearm during the commission of a crime on the 30th day of November, 1977. The Petitioner, at that time, received the death sentence for the charge of murder, a sentence of life imprisonment for the armed robber offense, the sentence of life imprisonment for the kidnapping offense, a sentence of ten (10) years to serve

Filed in Office
This 23rd day of April 1981
Time: 2:45 PM
Charles B. Stewart
Deputy Clerk

"APPENDIX B"

in the State Penitentiary for the offense of aggravated assualt, and a sentence of five (5) years to serve for the possession of a firearm during the commission of a crime offense. The sentence for the aggravated assualt offense and the offense of the possession of a firearm during the commission of a crime was made to run consecutive to the other sentences imposed by the Superior Court Judge. The death sentence was recommend by the jury after finding the statutory grounds of aggravating circumstances as required by law. The Superior Court Judge of Taliaferro County imposed the other sentences that the petitioner received.

The Georgia Supreme Court affirmed the Petitioner's conviction on the 24th day of January, 1979. Ruffin v. State, 243 Ga. [illegible] (1979). The Georgia Supreme Court denied the Petitioner's request for a re-hearing on February 14, 1979. The Petitioner then filed a petition for certorari with the United States Supreme Court, but that petition was denied with two Justices dissenting on the 10th day of December, 1979. Ruffin v. Georgia, ___U.S. _____, 100 S. Ct. 530 (1980). The Petitioner, Judson Ruffin, timely filed a petition for re-hearing in the Supreme Court of the United States, and that court denied the petition for re-hearing with four Justices dissenting. Ruffin v. Georgia, _____U.S._____, 100 S. Ct. 1029 (1980).

The Petitioner, in his petition as amended, has alleged in Count One and Two of his petition that his constitutional rights have been violated in that he was afforded ineffective assistance of counsel at his trial. The Petitioner bases his contentions on the alleged ommissions of counsel during the period prior to the trial that impeded the adequate defense that is essential to a death penalty case and that trial counsel failed to object to prejudicial questions by the prosecution on cross-examination and prejudicial statements made during closing arguments of the sentencing phase.

The Georgia Supreme Court has repeatedly denied granting of a habeas corpus petition on the grounds of ineffective assistance of counsel when the complaint deals with trial strategy. Pullin v. State,

237 Ga. 759 (1976); Banks v. Glass, 242 Ga. 518 (1978). Effectiveness of counsel is not determined by whether or not the Petitioner was convicted, or in this case sentenced to death, but rather the determination is made on whether or not the assistance of counsel was reasonably likely to render aid to the defendant at the time of his trial. The mere fact that the Petitioner's present counsel would, in hindsight, had made a different decision does not render the trial counsel's assistance ineffective. Pitts v. Glass, 231 Ga. 638 (1974); Estes v. Perkins, 25 Ga. 268 (1969).

The Petitioner's trial counsel, Walter Hardin, testified at the Habeas Corpus Proceeding that he had been appointed to represent the Petitioner on March 17, 1977. Attorney Walter Hardin testified at the hearing that he interviewed the Petitioner numerous times either at the jail facility or by telephone. The trial attorney thoroughly investigated the case by interviewing the State's witnesses, except for two boys that found the money drawer belonging to the gas station involved in the robbery and one GBI expert from Atlanta that was unavailable at the time. The trial attorney also spoke with the district attorney of the county and the Georgia Bureau of Investigation officers concerning the evidence that the State would offer at the trial.

The trial attorney, Walter Hardin, testified at the hearing that while he did not file a formal Brady v. Maryland type motion, he knew the evidence that the state intended to offer at the trial because of his working relationship with the district attorney's office in that circuit. Attorney Hardin estimated he spent a minimum of 300 hours in preparation for the Petitioner's trial.

The trial counsel was only informed on the Thursday night prior to the trial that his case would be tried on Monday, nevertheless, the trial counsel testified that he had already completed his work prior to the trial and he stated that he did not believe that a motion for continuance for additional time would have been beneficial or necessary. He further testified that in his belief that the request for such a continuance would not have been in his client's best interest as the Superior Court judge in charge of the case would not have normally granted such a request.

"Appendix B"

The Court finds that the trial counsel made a diligent search for mitigating circumstances during the penalty phase of the trial, but was unable to do so as the Petitioner had an extensive record in the juvenile court and had pending in other jurisdictions charges involving murder, armed robbery, and other various crimes of violence. The trial counsel was also unable to get the Petitioner's mother to testify in his behalf.

The record of the trial shows numerous objections by the defense counsel during both the trial itself and during the State's closing argument. While it is clear that the district attorney made a forceful closing argument during both the guilt-innocence phase of the trial and the sentencing phase of the trial, the record shows that no statements unobjected by the trial counsel was sufficient enough to deprive the Petitioner of a fundamentally fair trial.

The Court, after considering the charge of the Court during the guilt-innocence phase of the trial, finds that the charge of the Court was adequate and that the trial counsel's failure to object to any portion of the charge did not amount to ineffective assistance of counsel.

The Petitioner, in his brief to the Court, brought forth an additional ground of ineffective assistance of counsel and alleged that attorney Hardin was ineffective in that he did not make a motion to disqualify himself from representing the Petitioner and his co-defendan Nathan Brown, because the allegedly potential conflicts of interest adversely affected his representation of the Petitioner.

The United States Supreme Court has held that in order to establis a constitutional violation of the Petitioner's Sixth Amendment rights, the Petitioner, who raised no objection at the trial of his case, must demonstrate that an actual conflict of interest adversely affected the lawyer's representation, but the Petitioner does not have to demonstrat prejudice in order to obtain the relief prayed for in the petition. Cuyler v. Sullivan, 48 U.S.L.W. 4517 (1980). The Georgia Supreme Court, in light of this decision, has held that in death penalty cases each defendant is to be provided with separate and independant counsel.

D "Appellate P"

The Georgia Supreme Court however did not make this rule retroactive. Fleming v. State, 246 Ga. 90 (1980).

The Court, after reviewing the record of the trial of the Petitioner finds that while there may have been minor conflicts of interest present during the representation of the Petitioner by attorney Hardin, the conflicts of interest were not such that adversely affected the attorney's representation.

The Court, after considering all of the evidence submitted in this case, finds that the trial counsel's behavior during the trial of this case certainly fulfilled the requirements set out above. This Court therefore finds that the Petitioner's contentions are without merit and denies the relief prayed for in the petition.

In Count Three of the Petitioner's petition as amended, the Petitioner alleges that his constitutional rights have been violated in that he was denied due process and a fair trial by the prejudicial and improper inflamatory arguments made by the State during the closing argument.

The Georgia Supreme Court, has aleady decided this issue against the Petitioner on direct appeal. The Georgia Supreme Court, in its opinion, further found that Petitioner's sentence was not imposed on the influence of passion, influence or other arbitrary factors. These issues once decided by a appellate court cannot be reviewed by the habeas corpus court unless the Petitioner can produce evidence that the facts or law has changed since the opinion was rendered by that court. Pullium v. Balcum, 245 Ga. 99 (1980); Brown v. Ricketts, 233 Ga. 805 (1975); Elrod v. Ault, 231 Ga. 750 (1974). The Petitioner has failed to produce any evidence that would show that the factual situation has changed from the date of the Georgia Supreme Court opinion. The Court therefore finds that the Petitioner's contention is without merit and denies the petition on this ground.

The Petitioner in Count 4 and 5 of his petition alleges that his constitutional rights have been violated in that he was denied due process of law as he was denied his right to be present at the re-

"APPENDIX B"

sentencing hearing on the 26th day of May, 1980, and that the trial court abused its discretion in not exercising its authority to reco the legality of the sentence at the re-hearing.

It has been held in Georgia that while the defendant has the general right to be present during the course of his trial, that ri does not extend to post-verdict proceedings in which only questions law are determined. Dobbs v. State, 245 Ga. 202 (1980); Sims v. Smith, 228 Ga. 136 (1971); Reid v. State, 119 Ga. App. 368 (1969). The action of the trial court during this hearing was only exercisi its function of setting a new date for the Petitioner's execution. has been recognized that this function is merely a administrative function. Wrens v. Ricketts, 234 Ga. 716 (1975); Bower v. Grimes, Ga. 84 (1944). There is no requirement that a petitioner be brough before the court when the Petitioner is set a new date for his exec McLendon v. Blakcom, 208 Ga. 100 (1950). The Court therefore finds that Petitioner's contention is without merit and denies the petiti on this ground.

In Count 6 of the Petitioner's petition, the Petitioner alleges that his constitutional rights have been violated in that the court erred in failing to charge the definition of a "capital felony."

The court's failure to charge on the definition of "capital felony" as used in Ga. Code Ann. §27-2534.1(b)(2), without a timely written request, is not error. Berger v. State, 245 Ga. 458(1980). The Court finds that Petitioner's contention is without merit and therefore denies Petitioner's petition on this ground.

The Petitioner in Count 7(1) of his petition alleges that his constitutional rights have been violated in that the trial court er in charging the jury that the Petitioner could be sentenced to deat for the offense of kidnapping or armed robbery.

The habeas corpus court will consider allegations concerning charges to the jury if the deficiencies in the charge render the tr fundamentally unfair. Parrish v. Hopper, 238 Ga. 486 (1977); Byrd Hopper, 234 Ga. 248 (1975).

"Appendix B"

The Petitioner was not harmed by the charge of the trial court, as the jury did not render a death sentence on the armed robbery or kidnapping charge. The jury only recommended the death sentence on Count 5, the murder charge. The Court therefore finds that the conte of the Petitioner are without merit and denies the petition on this ground.

The Petitioner in Count 7(2) and 7(3) alleges in his complaint that his constitutional rights have been violated in that the aggrava circumstances found by the jury was only a "partial" finding of an aggravating circumstances set forth in Ga. Code Ann. §27-2534.1.

The Georgia Supreme Court found against the Petitioner on this issue on direct appeal. This issue cannot now be renewed by the Habeas Corpus Court unless the Petitioner can produce evidence that shows the facts or law have changed since the opinion was rendered by the Georgia Supreme Court. Pullium v Balkcom, supra; Brown v. Rickett supra.

The Georgia Supreme Court, in its opinion, determined that the verdict of the jury in Petitioner's case showed that the aggravating circumstances set forth in Ga. Code Ann. §27-2534.1(b)(2) and (b)(7). The Petitioner has failed to produce any evidence that would show that the factual situation or law has changed since the rendering of that opinion.

The United States Supreme Court has held that the statutory aggravating circumstances in Ga. Code Ann. §27-2534.1(b)(7) are not unconstitutional on their face. Gregg v. Georgia, 28 U.S. 153 (1976). In a later opinion, however, the Justices of the Supreme Court has held that the aggravating circumstances set out in Ga. Code Ann. §27-2534.1(b)(7) is being applied unconstitutionally in certain cases as the sentences in these cases were being imposed in an arbitrary and conpricious manner. Geoffery v. Georgia, 446 U.S. _____, 100 S.Ct. 1959 (1980).

In light of this decision, the Georgia Supreme Court set forth clear and objective standards to be used in applying Ga. Code Ann.

"Appendix B"

§27-2534.1(b)(7). Hance v. State, 245 Ga. 856 (1980). The statute has been determined requiring that the jury not only find that the murder is outrageously or wantonly vile, horrible or inhuman, but the facts in the case must show either aggravated battery to the victim, torture of the victim, or depravity of mind of the defendant, Hance v State, supra.

The jury may also consider, in determining whether the evidence shows depravity of mind, the age and the physicial characteristics of the victim. Hance v. State, supra.

The Georgia Supreme Court has in the past sustained the death penalty in cases in which the defendant shows a depravity of mind whe he carried out an execution type murder. Fair v. State, 245 Ga. 868 (1980); Johnson v. State, 242 Ga. 649 (1978); Harris v. State, 237 Ga 718 (1976).

The evidence produced at trial would permit the jury to find the aggravating circumstances set forth in Ga. Code Ann. §27-2534.1(b)(7) The evidence showed that the Petitioner and his co-defendants attempt to cover up the filling station armed robbery by a execution style killing. There was testimony to authorize the jury to conclude that the Petitioner and his co-defendants cased the filling station prior to the robbery. When the armed robbery occurred, there was no hesita on the part of the Petitioner and his co-defendants in taking the victims, Bonnie Bulloch and Henry Lee Phillips, captive.

The Petitioner and his accomplices by the use of their weapons forced Henry Lee Phillips into the trunk of the automobile and forced Bonnie Bulloch into the car as a passenger. The victims were then driven to a desolate wooded area and upon arriving were released fro the car and ordered to lie face down on the ground. The Petitioner and his accomplices then shot the victims with the result that Bonni Bulloch was killed instantly by a bullet penetrating his brain and M Phillips being wounded in the head, but fortunately surviving.

When the Petitioner was finally taken into custody by the autho and questioned, he admitted that he shot Bonnie Bulloch with a .32

caliber pistol and that the Petitioner, Nathan Brown and Jose High, left Augusta with the intention of robbing that particular station.

G.B.I. Special Agent Rob Ingram testified during the trial that, in his opinion, the remarks made by the Petitioner during interrogation and the general attitude of the Petitioner during the time showed that he did not care that he killed the victim. (T.T., p. 243). The facts of this case would authorize the jury to find that the murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind.

Finally, the death penalty should not be vacated in this case as the jury found an additional independent statutory aggravated circumstances under Ga. Code Ann. §27-2534.1(b)(2) in which the jury found that the murder was committed while perpertrating another capital felony. Collier v. State, 244 Ga. 553 (1979); Gates v. State, 244 Ga. 587 (1979); Danpier v. State, 245 Ga. 882 (1980).

The Georgia Supreme Court determined in its opinion that the verdict of the jury showed a Ga. Code Ann. §27-2534.1(b)(2) aggravating circumstance. This Court does not have the authority to review a decision made by the Appellant Courts. Pullium v. Balkcum, supra; Brown v. Ricketts, supra. The Court therefore finds that the Petitioner contentions are without merit and denies the petition on this ground.

In Counts 8, 9, and 10 of the Petitioner's petition as amended, the Petitioner alleges that his constitutional rights have been violated in that the trial judge failed to charge that the jury could return a sentence of life even if they found any statutory aggravating circumstances that the trial judge failed to charge on mitigating circumstances, and that the trial judge's charge to the jury was unlawful, confusing and prejudicial to the Petitioner in that it unduly emphasized the death sentence as opposed to life imprisonment.

The Georgia Supreme Court has already decided this issue against the Petitioner on direct appeal. These issues cannot now be reviewed by the habeas corpus court unless the Petitioner can produce evidence that the facts or law have changed since the opinion was rendered by

"APPENDIX B"

the Georgia Supreme Court. Pullium v. Balkcom, supra; Brown v. Rickett supra. The Petitioner has failed to produce any evidence that would show that the factual situation has changed since the date of the Georgia Supreme Court opinion. The decision of Lockett v. Ohio, 98 S.Ct. 2954 (1978), has not changed the law in Georgia concerning the language used to charge a jury during the sentencing phase of the trial. Redd v. State, 242 Ga. 876 (1979). The Court therefore finds that Petitioner's contentions are without merit and denies the petition on this ground.

The Petitioner in Count 11 of his petition as amended, alleges that his constitutional rights have been violated as the appellate review of the death sentences in Georgia deny effective assistance of counsel, deny the Petitioner a fair hearing on the issue of life or death by fully and properly reviewing the sentence imposed, and denied the Petitioner effective comparative analysis by the Georgia Supreme Court with other similar cases, both as to the particular crime and to the defendant to insure that the sentence is not disapportionate or excessive.

The statutory scheme in Georgia for the imposition of the death penalty, including Georgia's appellate review process, was approved by the United States Supreme Court. Gregg v. Georgia, supra. This appellate review process has been unheld by the Georgia Supreme Court in the face of later attacks. House v. Stynchcombe, 239 Ga. 222 (1977). The Court therefore finds that the Petitioner's contention is without merit and denies the petition on this ground.

The Petitioner in Count 12 of his petition as amended alleges that his constitutional rights have been violated in that the sentence of death as a punishment amounts to cruel and unusual punishment and is prohibited by the Eight Amendment of the United States Constitution.

The death penalty is a permissable punishment as long as the State upholds its constitutional responsibility by applying the law in a manner that avoids the arbitrary and capricious infliction of the death penalty. The United States Supreme Court and the Georgia Supreme Court has upheld the statute complained of in the petition as it

"APPENDIX B"

properly channels the jury's discretion by clearly objective standards that provides the tryor of facts specific detailed guidelines. Gregg v. Georgia, supra; Geoffery v. Georgia, supra; House v. Stynchcombe, supra. The Court finds that Petitioner's contention is without merit and therefore denies the petition on this ground.

The Petitioner in Count 13 of his petition as amended alleges that his constitutional rights have been violated in that the excusing of certain jurors demonstrating opposition to capital punishment violated the rule expounded by Witherspoon v. Illinois, 391 U.S. 410 (1968).

The Georgia Supreme Court in its opinion has already decided this issue against the Petitioner. The Court found that all of the jurors were excused because of a conscientious objection to the death penalty and made it unmistakedly clear that they were unalterably opposed to the imposition of the death penalty. Each juror expressly stated that they were unalterably opposed to the death penalty except Martha C. Turner and the Court found that she responded to the questions in a manner that made it clear that she was unalterably opposed to the death penalty. The Georgia Supreme found, as an extra reason to deny Petitioner's contention on appeal, that the State had three peremptory challenges remaining and therefore the exclusions of the jurors complained of for cause, if error at all, was harmless. It is exiomatic that habeas corpus may not be utilized as second appeal, and the issues decided on direct appeal may not be re-litigated by habeas corpus. Pullium v. Balkcom, supra; Brown v. Ricketts, supra. The Court finds that the Petitioner's contention is without merit and therefore denies the relief prayed for in the petition.

After reviewing all of the evidence, this Court concludes that none of the Petitioner's constitutional rights are being violated.

IT IS THEREFORE ORDERED AND ADJUDGED that the Petitioner be remanded to the custody of the Respondent for the execution of the Petitioner's death sentence.

IT IS FURTHER ORDERED AND ADJUDGED that the stay of execution entered by this Court on the 6th day of June, 1980, be hereby dissolved

SO ORDERED, this the 24th day of August, 1981.

JOHN R. HARVEY, JUDGE
Tattnall Superior Court
Atlantic Judicial Circuit

"APPENDIX B"

GEORGIA CODE PROVISIONS

IV. APPEALS OF HABEAS CORPUS AFTER CRIMINAL CONVICTIONS

Georgia Code Annotated Sec. 24-4526 When applications granted

An application to appeal a final judgment in a habeas corpus case after a criminal conviction will be granted where there is arguable merit.

Georgia Code Annotated Sec. 26-1101 Murder

(a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

(c) A person convicted of murder shall be punished by death or by imprisonment for life.

Georgia Code Annotated Sec. 26-1902 Armed Robbery

(a) A person commits armed robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another by use of an offensive weapon. The offense robbery by intimidation shall be a lesser included offense in the offense of armed robbery. A person convicted of armed robbery shall be punished by death or imprisonment for life, or by imprisonment of not less than five nor more than 20 years: Provided, however, that for a second or subsequent such offense, such defendant shall be punished by imprisonment for not less than 10 years. The preceding provisions of this section notwithstanding, in any case in which the defendant committed armed robbery and in the course of the commission of such offense intentionally, with an offensive weapon, inflicted serious bodily on a person, such fact shall be charged in the indictment or information, and if found to be true by the court or if admitted by the defendant, the defendant shall be punished by imprisonment for not less than 10 years.

(b) Adjudication of guilt or imposition of sentence shall not be suspended, probated, deferred, or withheld for any offense punishable under subsection (a) of this section.

Georgia Code Annotated Sec. 26-1311 Kidnapping

(a) A person commits kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will.

(b) A person over the age of 17 commits kidnapping when he forcibly, maliciously, or fraudulently leads, takes, or carries away, or decoys or entices away, any child under the

age of 16 years against the will of the child's parents or other person having lawful custody.

A person convicted of kidnapping shall be punished by imprisonment for not less than one nor more than 20 years: Provided that a person convicted of kidnapping for ransom shall be punished by life imprisonment or by death; and Provided, further, that if the person kidnapped shall have received bodily injury, the person convicted shall be punished by life imprisonment or by death.

Georgia Code Annotated Sec. 26-1302 Aggravated assault

A person commits aggravated assault when he assaults (a) with intent to murder, to rape, or to rob, or (b) with a deadly weapon. A person convicted of aggravated assault shall be punished by imprisonment for not less than one nor more than 10 years. A person who knowingly commits aggravated assault upon a peace officer while such peace officer is engaged in or on account of the performance of his official duties shall upon conviction be punished by imprisonment for not less than five nor more than 20 years.

Georgia Code Annotated Sec. 26-9908 (a) Possession of firearm or knife during commission or, or attempt to commit, certain crimes

Any person who shall have on his person a firearm or a knife having a blade of three or more inches in length during the commission of, or the attempt to commit, any crime against or involving the person of another, the unlawful entry into a building or vehicle or a theft from a building or theft of a vehicle and which crime is a felony shall be guilty of a felony and, upon conviction thereof, shall be punished by confinement and labor in the penitentiary for a period of five years, such sentence to run consecutively to any other sentence which the person has received. Upon the second or subsequent conviction of a person under this section, such person shall be punished by confinement and labor in the penitentiary for a period of 10 years. Notwithstanding any other provision of law to the contrary, the sentence of any person imposed for violating the provisions of this section a second or subsequent time shall not be suspended by the court and probationary sentence imposed in lieu thereof.

Notwithstanding any prior court decision to the contrary, any crime committed in violation of this section shall be considered a separate offense.

Georgia Code Annotated Sec. 50-127 Exclusive procedure for suing out a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence imposed against them by a State court of record

Notwithstanding the other provisions of this Title, the following is the exclusive procedure for suing out a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence imposed againt them by a State court of record:

(1) Grounds for writ.--

Any person imprisoned by virtue of a sentence imposed by a State court of record who asserts that in the proceedings which

p2 "APPENDIX C"

resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Georgia or the laws of the State of Georgia may institute a proceeding under this section. Except for objections relating to the composition of a grand or traverse jury, rights conferred or secured by the Constitution of the United States shall not be deemed to have been waived unless it is shown that there was an intentional relinquishment or abandonment of a known right or privilege which relinquishment or abandonment was participated in by the party and was done voluntarily, knowingly, and intelligently. The right to object to the composition of the grand or traverse jury will be deemed waived under this section, unless the person challenging the sentence shows in the petition and satisfies the court that cause exists for his being allowed to pursue the objection after the conviction and sentence has otherwise become final.

(2) Petition and verification.-- The petition shall identify the proceeding in which the petitioner was convicted, give the date of rendition of the final judgment complained of, and clearly set forth the respects in which petitioner's rights were violated. The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached. The petition shall identify any previous proceedings that petitioner may have taken to secure relief from conviction. Argument and citations of authorities shall be omitted from the petition. The petition must be verified by the oath of the applicant or some other person in his behalf.

(3) Jurisdiction and venue.--

The petition must be filed in the superior court of the county wherein the petitioner is being detained. The superior courts of such counties have exclusive jurisdiction of habeas corpus actions arising under this section.

(4) Service of the petition.--

Service of the petition shall be made upon the person having custody of the petitioner. If the petitioner is being detained under the custody of the Board of Corrections, an additional copy of the petition shall be served on the Attorney General; however, if the petitioner is being detained under the custody of some other authority other than the Board of Corrections, an additional copy of the petition shall be served upon the solicitor general of the county wherein the petition is filed. Service upon the Attorney General or the solicitor general may be had by mailing a copy of the petition along with a proper certificate of service.

(5) Custody of petitioner.--

Custody and control of the petitioner shall be retained by the Board of Corrections or other authority having custody of the petitioner and it shall be the duty of such board or authority to produce the petitioner at such times and places as the court may direct.

(6) Proceedings on petition.--

Within 20 days after filing and docketing of the petition, or within such further time as the court may set, the respondent shall answer or move to dismiss the petition. The court shall set the case for a hearing on the issues within a reasonable time after the filing of defensive pleadings.

p.3 "Appendix C"

(7) Disposition in the trial court.--

(a) The court may receive proof by depositions, oral testimony, sworn affidavits, or other evidence.

(b) The taking of depositions or depositions upon written questions, by either party, shall be governed by the provisions of sections 81A-126 through 81A-132 and 81A-137: Provided, however, that the time allowed in section 81A-131 for service of cross-questions upon all other parties shall be 10 days from the date the notice and written questions are served.

(c) If sworn affidavits are intended by either party to be introduced into evidence, the party intending to introduce the affidavit shall cause it to be served upon the opposing party at least five days in advance of the date set for a hearing in the case. The affidavit so served shall be accompanied by a notice of the party's intention to introduce it into evidence. The superior court judge considering the petition for writ of habeas corpus may resolve disputed issues of fact upon the bases of sworn affidavits standing by themselves.

(d) If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence challenged in the proceeding and such supplementary orders as to rearraignment, retrial, custody, or discharge as may be necessary and proper. In all cases the court shall dispose of the matter as law and justice require.

(8) Transcribing proceedings.--

All trials held under this section shall be transcribed by a court reporter designated by the superior court hearing the case.

(9) Judge's findings of fact and conclusions of law.--

After reviewing the pleadins and evidence offered at the trial of the case, the judge of the superior court hearing the case shall make the written findings of fact and conclusions of law upon which the judgment is based. Such findings of fact and conclusions of law shall be recorded as part of the record of the case.

(10) Subsequent petitions--waiver of grounds not claimed.

All grounds for relief claimed by a petitioner of a writ of habeas corpus shall be raised by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of the State of Georgia otherwise requies, or any judge to whom the petition is assigned on considering a su bsequent petition, finds grounds for relief assserted therein which could not reasonably have been raised in the original or amended petition.

(11) Practice as to appeals.--

(a) Appeals in habeas corpus cases shall be governed by the Appellate Procedure Act of 1965 [Sec. 6-701 et seq.], except that as to final orders of the court which are adverse to the petitioner, no appeal shall be allowed unless a justice of the Supreme Court of Georgia shall issue a certificate of probable cause for such appeal.

(b) Within 30 days from the entry of the order denying relief to the petitioner, a written application for a certificate of probable cause to appeal must be filed with the clerk of the Supreme Court of Georgia, if the unsuccessful petitioner desires to appeal. The petitioner shall also file, within the same period, a notice of appeal with the clerk of the concerned

p. 4 "Appendix C"

superior court. A justice of said appellate court shall either grant or deny the application within a reasonable time after filing. So the justice may fully consider the request for a certificate, the clerk of the concerned superior court shall forward as in any other case, the record and transcript if designated, to the clerk of the Supreme Court of Georgia when a a notice of appeal is filed. The clerk of the concerned superior court need not prepare and retain and the court reporter need not file, a copy of the original record and a copy of the original transcript of proceedings. The clerk of the Supreme Court of Georgia shall return the original record and transcript to the clerk of the concerned superior court upon completion of the appeal if the certificate is granted. If the Justice of the Supreme Court of Georgia denies the application for a certificate of probable cause, the clerk of the Supreme Court of Georgia shall return the original record and tanscript and notify the clerk of the concerned superior court and the parties to the proceedings below of the determination that probable cause does not exist for appeal.

(c) If the trial court finds in favor of the petitioner, no certificate of probable cause need be obtained by the respondent as a condition precedent to appeal. A notice of appeal filed by the respondent shall act as a supersedeas and stay the judgment of the superior court until there is a final adjudication by the appellate court: Provided, however, that while such case is on appeal, the petitioner may be released on bail as is now provided for in criminal cases, except where the petitioner has been convicted of a crime over which the Supreme Court of Georgia has jurisdiction to consider on direct appeal. The right to bail and the amount of bond shall be within the discretion of the judge of the superior court where the sentence successfully challenged under this Chapter was originally imposed.

Georgia Code Annotated Sec. 27-2534.1 Mitigating and aggravating circumstances; death penalty

*(b)(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

*(b)(2) The offense of murder, rape, armed robbery, or kidnarping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

Georgia Code Annotated Sec. 81-1009 (4957) Improper conduct by counsel; duty of court

Where counsel in the hearing of the jury make statements of prejudicial matters which are not in evidence, it is the duty of the court to interpose and prevent the same; and, on objection made, he shall also rebuke the counsel, and by all needful and proper instructions to the jury endeavor to remove the improper impression from their minds;

*These were the "purported" aggravating circumstances the jury allegedly found to warrant Petitioner's death sentence. Ruffin, supra, p. 107.

p. 5 "Appendix C"

or, in his discretion, he may order a mistrial if the plaintiff's attorney is the offender. (90 Ga. 501 (16 S.E. 49), 430 (17 S.E. 1003); 91 Ga. 728 (18 S.E. 987); 85 Ga. 318 (11 S.E. 706).)

Georgia Code Annotated Sec. 24-3319 Rule 19. Argument of law and fact

Arguments of counsel shall be confined to the law and the facts involved in the case then before the court, on pain of being considered in contempt; and in all civil cases questions of law shall be argued exclusively to the court, and questions of fact to the jury. Counsel shall not be permitted, in the argument of criminal cases, to read to the jury recitals of fact or the reasoning of the court as applied thereto, in decisions by the Supreme Court or Court of Appeals.

p.6 "Appendix C"

81-6082

Supreme Court, U.S.
FILED
JAN 19 1982
Alexander L. Stevas, Clerk

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JUDSON RUFFIN,
Petitioner

vs

SAM AUSTIN, Warden,
Georgia State Prison,
Respondent

No. 81-6082

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, JUDSON RUFFIN, who is now held in the Georgia Diagnostic and Classification Center at Jackson, Butts County, Georgia, asks leave to file the attached Petition for a Writ of Certiorari to the Supreme Court of Georgia without prepayment of costs and to proceed in forma pauperis.

Affidavit of Petitioner in support of this motion is attached hereto.

WILLIAM H. BRANDON
Attorney for Petitioner

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(404) 523-8081

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

JUDSON RUFFIN,
Petitioner
vs
SAMUEL W. AUSTIN, Warden,
Georgia State Prison
Respondent

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, JUDSON RUFFIN, being first duly sworn, depose and say that I am the Petitioner in the above-styled case; that in support of my Motion to proceed on appeal without being required to prepay fees, costs, or give secuirty therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or give security thereof; and that I beiieve I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes ___ No ✓
   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____
   b. If the answer is no, state the date of your last employment, and the amount of the salary and wages per month which you received. 1970/$3.20/$125.00

2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment or in the form of rent payments, interest, dividends, or other source? Yes ___ No ✓
   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings accounts? Yes ___ No ✓

a. If the answer is yes, state the total value of the items owned. _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding oridnary household furnishings and clothing)? Yes ___ No ✓

a. If the answer is yes, describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support and state your relationship to those persons. _____

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Judson Ruffin

JUDSON RUFFIN

STATE OF GEORGIA
COUNTY OF BUTTS

Sworn to and subscribed to before me this 7 day of Jan, 1982.

Dawn Logsdon

NOTARY PUBLIC

My commission expires: 6-20-83

Opposition

NO. 81-6082

RECEIVED
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JUDSON RUFFIN,

Petitioner,

v.

SAMUEL W. AUSTIN,
WARDEN, GEORGIA
STATE PRISON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether or not Petitioner received effective assistance of counsel in accordance with his Sixth Amendment right under the United States Constitution?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	2
REASONS FOR NOT GRANTING THE WRIT	
THE STATE COURTS BELOW AFTER A FULL AND FAIR HEARING, CONSIDERED AND CORRECTLY DECIDED THAT PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IN ACCORDANCE WITH THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION	4
CONCLUSION	10
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

Cases cited: Page(s)

Akridge v. Hopper, 545 F.2d 457 (5th Cir. 1977), cert. den., 431 U.S. 941 (1977) 9

Beckham v. Wainwright, 639 F.2d 262 (5th Cir. 1981) 9

Brown v. State, 247 Ga. 298, 275 S.E.2d 52 (1981) 1, 4

Clark v. Blackburn, 619 F.2d 431 (5th Cir. 1980) 9

Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 333 (1980). 5, 8

High v. State, 247 Ga. 289, 276 S.E.2d 5 (1981). . . . 1

Holloway v. Arkansas, 435 U.S. 475, 482, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978) 4

Jones v. Estelle, 622 F.2d 124 (5th Cir. 1980) 9

Kemp v. Leggett, 635 F.2d 453 (5th Cir. 1981) 8

Lee v. Hopper, 499 F.2d 456 (5th Cir. 1974) 10

Lovett v. Florida, 627 F.2d 706 (5th Cir. 1980). . . . 8, 10

Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981) . 9, 10

Ruffin v. State, 243 Ga. 95 (1975), cert. den., 444 U.S. 995, rehng. den., 444 U.S. 1103 (1980). 1, 2

United States v. Johnson, 615 F.2d 1125 (5th Cir. 1980) 9

PART ONE

STATEMENT OF THE CASE

Petitioner, Judson Ruffin, was convicted in the Taliaferro County Superior Court on November 30, 1977, for the offenses of murder, armed robbery, kidnapping, aggravated assault, and possession of a firearm during the commission of a crime. (R. 25; T. 394-395).[1/] The Petitioner was indicted for the aforesaid offenses along with his co-defendants Nathan Brown and Jose High, but was tried separately. He received the death penalty on the murder count, and a life sentence each for armed robbery and kidnapping, in addition to five years consecutive for possession of a firearm and ten years consecutive for aggravated assault. (R. 28-34, T. 443-445). Petitioner's co-defendants also received death penalties. See, Brown v. State, 247 Ga. 298, 275 S.E.2d 52 (1981); High v. State, 247 Ga. 289, 276 S.E.2d 5 (1981). Petitioner's convictions and sentences were affirmed on direct appeal. Ruffin v. State, 243 Ga. 95 (1979), cert. den., 444 U.S. 995, rehng. den., 444 U.S. 1103 (1980).

Following the denial of certiorari by this Court on Petitioner's direct appeal, he filed a state habeas corpus petition in the Superior Court of Tattnall County, Georgia. Following an evidentiary hearing, the Tattnall County Superior Court, in an order dated April 23, 1981, denied Petitioner's request for relief. The Georgia Supreme Court denied his application for a certificate of probable cause to appeal on October 21, 1981,

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1/ References to the pagination of the official record and transcript of Petitioner's trial are referred to in this Brief as (R.___) and (T.___). References to the transcript of Petitioner's habeas corpus hearing which was held in the Tattnall County Superior Court on October 31, 1980, shall be designated as (HT. ___).

and thereafter, Petitioner filed his second petition for certiorari in this Court.

PART TWO

STATEMENT OF THE FACTS

A summary of the evidence produced at Petitioner's trial is contained in the Georgia Supreme Court's opinion in Ruffin v. State, supra, 243 Ga. at p. 95. Essentially, the evidence overwhelmingly showed that the Petitioner and his co-defendants Jose High and Nathan Brown, conspired and planned the late night, July 26, 1976, robbery of an Amoco service station near Crawfordville, Georgia. Three witnesses at trial testified that they saw the Petitioner's automobile parked near the service station at approximately 11:00 p.m. on the night of the robbery. Two of the witnesses also had seen the car pass by the station earlier that evening.

During the armed robbery, the perpetrator kidnapped eleven year old Bonnie Bulloch and his step-father, Henry Lee Phillips. After taking the cash register and demanding more money, Petitioner and his cohorts forced Mr. Phillips at gunpoint into the trunk of Petitioner's automobile, and forced young Bonnie into the back of the car. The victims were then driven to a desolate wooded area, where they were released from the trunk, but were ordered at gunpoint to lie face down on the ground. At this point Henry Phillips heard shots being fired, was rendered unconscious, and when he awoke he discovered that his stepson had been shot in the head

and killed. Phillips had also been shot in the temple and wrist. After his revival he managed to walk to a nearby house where the sheriff was summoned.

Phillips was able to describe and direct a composite picture of the Petitioner, and later identified him from a photographic lineup.

Following Petitioner's arrest he was questioned by the police, and admitted that he, Brown and High planned and committed the robbery. Petitioner told a Georgia Bureau of Investigation agent that he had shot Bonnie Bulloch in the head with a .32 caliber pistol while his co-defendants also fired at the victims. After the robbery and murder the three perpetrators then returned to Augusta, Georgia.

At trial, Petitioner testified in his own behalf and stated that he did not know what he was signing when he signed his statement which was made to the police, and he also claimed that the statement was involuntary. Petitioner also claimed he had never owned a .32 caliber revolver, and testified he had not committed the alleged crimes charged against him. Petitioner's fourteen year old sister, also testified that Petitioner went to a musical concert in Macon, Georgia on the night of the crime.

Additional facts may be related in the following portion of this Brief to more fully explain Respondent's arguments.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

THE STATE COURTS BELOW AFTER A FULL AND FAIR HEARING, CONSIDERED AND CORRECTLY DECIDED THAT PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IN ACCORDANCE WITH THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The only issue raised in the instant petition pertains to the question of whether or not Petitioner received effective assistance of counsel prior to and during his trial, in which the death penalty was ultimately imposed. Petitioner's trial attorney, Mr. Walton Hardin, testified at the state habeas corpus hearing which was held in the Superior Court of Tattnall County, Georgia. Petitioner was represented by counsel at this hearing. Mr. Hardin's testimony conclusively established that Petitioner received effective assistance in accordance with the Sixth Amendment to the United States Constitution.

Petitioner initially attacks Attorney Hardin's pretrial representation of Petitioner, by asserting that there was a conflict of interest because Attorney Hardin was originally appointed to represent Petitioner and both of his co-defendants. Ultimately one of the co-defendants, Jose High, secured retained counsel. (HT. 69; see Brown v. State, supra, 247 Ga. at p. 299). As has been noted by this Court,

> "[M]ultiple representation does not violate the Sixth Amendment unless it gives rise to a conflict of interest. [Citing Holloway v. Arkansas, 435 U.S. 475, 482, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978)] . . .

> In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 333 (1980).

Here, Petitioner has made no showing that his counsel actively represented conflicting interests or that Petitioner was in any way prejudiced by Mr. Hardin's representation of both Petitioner and Nathan Brown. Petitioner's cite to Attorney Hardin's testimony that Petitioner did not tell him about being "high on dope," but that Attorney Hardin learned such information from a co-defendant really has no relevancy to any prejudicial conflict. Petitioner consistently denied the use of drugs on the night of the robbery, and there is nothing anywhere to indicate that he had been utilizing drugs when he signed the confession. Petitioner testified that he was arrested approximately at 3:00 or 4:00 in the morning (T. 212), and testimony of GBI Agent Ingram indicates that he signed the confession at approximately 7:25 p.m. (T. 205). Petitioner's insinuations that Attorney Hardin decided not to put Petitioner on the witness stand during the guilt/innocence phase of Petitioner's trial, because of co-defendant High's criminal record, is simply taken out of context, and again has no bearing on any alleged conflict of interest. As has been noted earlier, co-defendant High had retained his own counsel. Moreover, it would not have been proper on cross-examination of the Petitioner to elicit questions about Petitioner's

co-defendant. Finally, it was not High's record that Attorney Hardin was actually worried about, it was the Petitioner's own past criminal behavior. As Attorney Hardin stated at the habeas hearing,

> "I told him point blank that with the other charges pending in Augusta, I saw no possibility of him taking the witness stand. And he concurred." (HT. 107).

In conclusion, Petitioner failed to show any prejudicial conflict as a result of his attorney's multiple representation of Petitioner and his co-defendants.

There is also no merit of Petitioner's assertions that Attorney Hardin was ineffective in his pretrial investigation of the case, or in failing to request a continuance after being informed that Petitioner's case was about to come to trial. Attorney Hardin testified that he had been appointed to represent Petitioner on March 17, 1977, and he immediately started preparing a case. (HT. 71-72, 78, 103). Following his appointment, Attorney Hardin interviewed Petitioner and spoke with him on the telephone on numerous occasions, thoroughly investigated the facts of the case, interviewed the state's witnesses and spoke to the district attorney and Georgia Bureau of Investigation Agent Ingram relating to the evidence that the State would offer at trial. Attorney Hardin said that GBI Agent Ingram related all of the relevant evidence to him. (HT. 74-76, 104-105). It is clear that formal discovery motions were unnecessary in the case. Mr. Hardin estimated that he spent a minimum of three hundred hours in preparation for trial. (HT. 104). Although Attorney Hardin was appointed in March of 1977,

Petitioner's trial did not start until November 29, 1977. Although Mr. Hardin was only informed on Thursday, prior to trial that the case would be called on the following Monday; nevertheless, he had already done his pretrial preparation, and did not believe that a motion for a continuance or additional time would have been necessary or even beneficial. It was his opinion that any motion for a continuance would have been unsuccessful. (HT. 76-77, 105). Immediately after being informed on Thursday that Petitioner's case would be called the following Monday, Mr. Hardin began to make his final preparations, he contacted the Petitioner and proceeded to work all weekend. (HT. 72, 103-104). Contrary to Petitioner's assertions, the record does not support his allegations that Attorney Hardin did not start investigating for mitigating circumstances until the weekend before trial. Attorney Hardin attempted to locate witnesses who might testify during the sentencing phase but he was unsuccessful, and Petitioner's own mother refused to testify. (HT. 106-109).

Attorney Hardin indicated that although he had later assisted in a successful challenge to the grand jury in co-defendant High's case, he had not earlier challenged the jury in Petitioner's case because he felt there was no chance that such a challenge would have been successful. (HT. 79). In any case, Petitioner was not prejudiced by the failure to challenge the grand jury, as is evidenced by the later indictments of both High and Brown on the same charges under a new indictment. (T. 80). As was previously noted, both Brown and High also received the death penalty. An attorney's actions at trial should not be viewed, at a later habeas corpus attack, through the finely tuned .20/.20 lenses of retrospect. Criminal defendants are not entitled to

perfect counsel but only counsel rendering and likely to render reasonably effective assistance. Cuyler v. Sullivan, supra; Kemp v. Leggett, 635 F.2d 453 (5th Cir. 1981); Lovett v. Florida, 627 F.2d 706 (5th Cir. 1980). Contrary to Petitioner's assertions, Attorney Hardin's testimony does not show that he did nothing to advise Petitioner of his right to challenge the grand jury. Hardin simply testified that the Petitioner knew nothing about the grand jury composition. The Petitioner made no showing that any challenge to his traverse jury would have been successful or that Attorney Hardin was ineffective for not making such a challenge.

Likewise, a review of the trial transcript in this case does not demonstrate that the trial judge was not impartial. There was no need to secure financial assistance in the preparation of the trial, since the case was not complicated, and Attorney Hardin had approximately nine months to prepare. In conclusion, there is no merit to any of Petitioner's assertions that Mr. Hardin's pretrial representation of Petitioner fell below the constitutional requirement of effective assistance.

Petitioner's arguments on ineffective assistance pertaining to Mr. Hardin's representation during Petitioner's trial relate to decisions by the defense counsel as to whether or not to object or make motions for mistrial as a result of prosecutorial questioning and argument at Petitioner's trial. It is obvious that these allegations pertain to matters which fall within the ambit of attorney trial decisions and tactics. These include Petitioner's criticisms of the way counsel examined and cross-examined particular witnesses, counsel's decision to elicit, or failure to elicit, certain testimony, counsel's decision to object

or not to object to questioning, arguments or testimony. Such decisions do not rise to the level of ineffective assistance so as to permit habeas corpus relief, even if, in retrospect, it appears that counsel may have made a wrong choice. Akridge v. Hopper, 545 F.2d 457 (5th Cir. 1977), cert. den., 431 U.S. 941 (1977); Beckham v. Wainwright, 639 F.2d 262 (5th Cir. 1981).

The trial record shows numerous objections by defense cousel both during the trial itself and during the state's closing argument. It is clear that the district attorney made a forceful closing argument both during the guilt/innocence phase of the trial, and during the sentencing phase; however, a review of the record shows no statements that were unobjected to by the defense, and which were sufficient to deprive Petitioner of a fundamentally fair trial. Likewise, the trial court's instructions to the jury during both the guilt/innocence and the sentencing phases of Petitioner's trial were adequate when considered as a whole, and defense counsel's failure to object to any portions thereof again, did not amount to constitutional error.

As has been noted previously, the standard for effective assistance of counsel under the Sixth Amendment to the United States Constitution is now well established. A criminal defendant is entitled to representation by an attorney reasonably likely to render and rendering reasonably effective assistance. Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981); Jones v. Estelle, 622 F.2d 124 (5th Cir. 1980). Of course the standard does not require errorless counsel nor counsel judged ineffective by hindsight. United States v. Johnson, 615 F.2d 1125 (5th Cir. 1980); Clark v. Blackburn, 619 F.2d 431 (5th Cir. 1980). The totality of the

circumstances surrounding the trial and the entire record must be considered in examining the performance of counsel. Lovett v. Florida, supra; Lee v. Hopper, 499 F.2d 456 (5th Cir. 1974). "It is within this framework of totality of the circumstances that we judge the 'fundamental fairness' of the trial and ultimately a counsel's ineffectiveness." Nelson v. Estelle, supra, at p. 906.

Respondent submits that the entire record in this case supports a finding that Attorney Hardin's overall representation of the Petitioner was adequate and in accordance with the Sixth Amendment mandate.

CONCLUSION

For all of the aforesaid reasons, Petitioner's request for a writ of certiorari should be DENIED.

Respectfully submitted,

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